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No. 829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE CITY OF COLUMBUS, OHIO,
Petitioner,

vs.

STATE OF OHIO, EX REL., VIRGINIA ROYAL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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THE CITY OF COLUMBUS, OHIO,
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STATE OF OHIO, EX REL., VIRGINIA ROYAL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner, the City of Columbus, Ohio, prays that a writ of certiorari issue to review the decision of the Supreme Court of Ohio, entered in the above entitled case on July 21, 1965.

CITATION TO OPINION BELOW

The written opinion of the Ohio Supreme Court can be found reprinted in Appendix A at page 24, and is reported in 3 Ohio State 2d 154, 209 N.E. 2d 405. The opinion of the Tenth District Court of Appeals is unreported, but appears reprinted in Appendix A, at page 19. The opinion of the Common Pleas Court of Franklin County is unreported, but appears reprinted in Appendix A, at page 17.

JURISDICTION

The opinion of the Supreme Court of Ohio in the above entitled case was rendered on July 21, 1965. Rehearing in this case was denied on September 22, 1965. The jurisdiction

of this honorable court is invoked under 28 U.S.C.A., Section 1257 (2) (3).

QUESTIONS PRESENTED

1) May the Supreme Court of Ohio deny the existence of the superior and exclusive right possessed by the United States in the navigable airspace as now constituted, which includes that amount of airspace needed to insure safety in landing and taking off, thus compelling petitioner to utilize its power of eminent domain to appropriate avigation easements through and for the use of airspace owned by the United States.

2) Where Congress through the exercise of the authority vested in it by the Commerce Clause places certain clearly defined airspace in the "navigable airspace," pre-empting any private ownership of such airspace, may the Supreme Court of Ohio contrary to the statutes of the United States create a private property right in such navigable airspace, and compel petitioner to utilize its power of eminent domain to appropriate that right.

3) May the Supreme Court of Ohio in contravention to the established public right of free transit in the navigable airspace of the United States, possessed by every citizen of the United States compel petitioner to exercise its power of eminent domain to appropriate avigation easements through such airspace, after Congress has clearly pre-empted such airspace, and by its action precluded any state from exercising its power of eminent domain in that airspace.

4) May the Supreme Court of Ohio, by disregarding Section 101 (24) and 104 of the Federal Aviation Act of 1958, contravene the equal protection clause of the Fourteenth Amendment and/or the Fifth Amendment to the Constitu-

tion of the United States apply different treatment to those citizens of the State of Ohio and of the United States than is accorded citizens of the United States similarly situated, requiring those citizens to purchase the right to use the airspace owned by the United States, where no other citizen of the United States has this requirement imposed in their use of the navigable airspace.

STATUTES INVOLVED

The applicable statutory provisions involved are Section 101 (24) and 104 of the Federal Aviation Act of 1958, Pub. L. 85-726, Title I, Section 101 (24) and 104, 49 U.S.C.A., Sections 1301 (24) and 1304, F.C.A. 49 Sections 1301 (24) and 1304. The applicable constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States and the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3. All statutory and constitutional provisions referred to herein appear reprinted in full in Appendix B at page 31.

STATEMENT

On October 10, 1961, the initial suit which forms the basis of this case was filed in the Common Pleas Court of Franklin County, Ohio, by some twenty-eight (28) property owners, alleging that the City of Columbus, Ohio, a municipal corporation, (which owns and operates the Columbus Municipal Airport, an international airport) pursuant to the plans and specifications of Project 9-33-017-5905 of the Federal Aviation Administration had caused to be constructed an instrument runway some six thousand feet in length and known and designated as Runway 9 Left, 27 Right, which runway was placed in operation in July, 1961 (R37), that their property lay within the instru-

ment approach zone to said runway under the terms of the Federal Aviation Administration Technical Service Order No. 18, and amendments thereto. Respondents herein in the lower court action sought a writ of mandamus to compel petitioner to institute appropriation proceedings to appropriate avigation easements over the property of each respondent herein, and to compensate each respondent for the avigation easement so appropriated. Respondents' allegations were further to the effect that petitioner by use of the runway designated herein, and by reason of the frequent and low level flights over respondents' property appropriated an avigation easement over each of respondents' property without having properly compensated each respondent.

At the trial of the case, which began on January 21, 1963, respondents' case in chief consisted primarily of testimony given by several of the property owners involved as to how their property was affected. This testimony, in almost all instances failed to demonstrate the frequency of the flights or the height of such flights (R62, 72, 78, 88 and 99). Respondents were unanimous in their testimony to the effect that they all experienced noise by virtue of their being in close proximity to the Airport, that they experienced vibrations from aircraft operating near, but not over their property. Many of the respondents failed to present any evidence either of flights over their property or in the vicinity (R 91). It was further brought out that the majority of the properties had been involved in a major flood that occurred in the year 1959, being under water at varying depths for varying lengths of time. In fact, the only time that any respondent was in fact forced to leave his property occurred when that particular respondent's property was severely flooded during the flood which occurred in Columbus, Ohio, in the year 1959. (R 83).

Petitioner in its case in chief presented evidence to the effect that Runway 27 Right, 9 Left, was used infrequently, and that its primary use was restricted to periods of heavy traffic when it would take the overflow traffic from other runways. (R 109) It was further brought out that Runway 27 Right, 9 Left, having been equipped for instrument landings, was used for this purpose only during periods of emergency. Petitioner's further evidence was elicited through expert witnesses, pilots who had landed and taken off from this runway, these pilots testified as to the height of their aircraft, when passing over Wonderland Addition (the area where respondents lived), in landing and taking off from Runway 27 Right, 9 Left. (R 125-178) This evidence was to the effect that the absolute minimum altitude of aircraft passing over Wonderland Addition in landing and taking off of Runway 27 Right, 9 Left would be three hundred feet. It was further established by petitioner in its case in chief that The Federal Aviation Administration Technical Standard Order No. 18, did not relate to the operation of the aircraft, as they landed and took off from Runway 27 Right, 9 Left, but was a safety factor, a federal requirement to be taken into consideration in constructing the airport. Further, testimony established that Runway 27 Right, 9 Left was six thousand feet in length, and that it was rarely, if ever, used for jet traffic.

The Franklin County Common Pleas Court in its decision rendered July 5, 1963, found that as a result of the "interference" testified to by respondents, namely the aircraft flying in the vicinity of respondents' property, as well as the occasional flights over their property disturbed their sleep, peace and quiet, rendered their television unusable and caused their dishes to rattle, that property rights had been "taken" from respondents (R. 188, 189). The Franklin County Common Pleas Court on the basis of this decision

issued a single writ of mandamus to apply and govern all twenty-eight (28) respondents.

On appeal, the Tenth District Court of Appeals affirmed the decision of the trial court, finding no prejudicial error in the record.

On further appeal to the Supreme Court of Ohio, that Court on July 21, 1965, in its opinion announced that day affirmed the decision of the Tenth District Court of Appeals, holding, after announcing that the principles to be found in the cases of *United States vs. Causby*, 328 U.S. 256, 90 L. Ed. 1206, and *Griggs vs. Allegheny County*, 369 U.S. 84, 8 L. Ed. 585, were applicable; that "the constitutional taking of private property exists whenever flights are so low and so frequent as to a direct and immediate interference of the enjoyment and use of the land." A petition for rehearing directed to the Supreme Court of Ohio was denied September 22, 1965, leaving petitioner and countless others throughout the State of Ohio, who in their use of the navigable airspace had been given a free right of transit through that navigable airspace by Section 101 (24) and 104 of the Federal Aviation Act of 1958, in a position that is best characterized by the language found in the dissenting opinion written by Judge Schneider, of the Supreme Court of Ohio, wherein he pointed out that:

> "In effect, *the plaintiffs, and countless numbers similarly or even remotely situated, will receive* from a subdivision of the sovereign, acting in a sovereign capacity, *varying amounts of money damages for injury to their sensibilities.*"

The questions which are raised herein arose in the Franklin County Common Pleas Court by reason of the motion made by petitioner to dismiss respondents' case which was overruled. (R 106) They were again raised in

the briefs and assignments of error directed to the Tenth District Court of Apeals, in the questions of law posed for determination by the Supreme Court of Ohio, and again specifically in the petition for rehearing directed to the Supreme Court of Ohio.

REASONS FOR GRANTING A WRIT

This case is without question of extreme national importance, and will have a significant and obvious effect not only upon petitioners but every other municipally owned airport throughout the State of Ohio, and upon the greatly expanding field of air commerce throughout this country. The questions which have been posed herein, and which have been urged to the lower courts are clearly substantial in character, and clearly pose the question of whether or not Congress by reason of the power granted to it by the Commerce Clause will have the ultimate and exclusive power to regulate this greatly expanding and important field of air commerce, or will the various state courts be permitted to erode away this power contrary to the Constitution of the United States and this Honorable Court's pronouncement in *United States v. Causby*, 328 U.S. 256, 98 L. Ed. 1206, to the point where we no longer have a uniform regulation of the airspace, but are faced with separate regulations and decisions with respect to each and every state, with different amounts being paid to purchase the right to use the navigable airspace over each separate state. To contemplate such a confused and chaotic situation is to realize the national importance of this case, and the threat it poses to a clearly evolved and definitely established congressional scheme of air regulation, as set forth in the Federal Aviation Act of 1958. Insofar as this petitioner is aware, this Honorable Court has de-

cided no case expressly involving the Federal Aviation Act of 1958 and its expansion of the navigable airspace of the United States. The airplane and all its refinements is now more than ever a part of the modern environment and way of life thereby making this decision even more inconsistent with property rights possessed in the airspace above ones property, as those rights have now evolved and developed. Can the Supreme Court of Ohio in effect erect a wall around the State of Ohio, disregard the established principle of a free right of transit through the navigable airspace of the United States, and say to the citizens of the United States, the right to use this airspace must be purchased.

This Honorable Court in the landmark case of *United States vs. Causby,* 328 U.S. 256, 98 L. Ed. 1206, recognized that had Congress, at that time, included that amount of airspace needed to insure safety for landing and taking off from airports in its definition of navigable airspace as that term was defined by the Civil Aeronautics Act of 1938, F.C.A. 49 Section 401 (24), such airspace would be part of the public domain. At page 264 of the majority opinion in that case, this Honorable Court clearly indicated this proposition pointing out that:

> "Hence, the flights in question were not within the navigable airspace which Congress placed within public domain. *If any airspace needed for landing or taking off were included flights which were so close to the land as to render it uninhabitable would be immune.* (Emphasis added)

Since the time of that decision, Congress has corrected this inadequacy of the Civil Aeronautics Act of 1938 through the enactment of the Federal Aviation Act of 1958, and promulgated a complete, extensive, and exclusive regulatory scheme which includes by its terms, as a part

of the "navigable airspace", "that amount of airspace needed to insure safety in taking off and landing from airports". That airspace is now, by the terms of the present act, an integral part of the navigable airspace of the United States, Section 101 (24) infra Appendix B—and by virtue of that fact is now a part of the public domain. The Act by its terms further gives every citizen of the United States a public right of free transit through the navigable airspace, Section 104, infra Appendix B —. The obvious and clear result of this exercise by Congress of the power vested in it by the Commerce Clause is to pre-empt and preclude private ownership in that airspace which has been declared to be a part of the navigable airspace, and thus part of the public domain. There can be no question now but that the "high and low" of the navigable airspace is now part of the public domain. The Supreme Court of Ohio should not be permitted to erect a barrier to that free right of transit, or in other words to obstruct the free flow of air commerce by this action. *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F. 2d 812; and *Newark v. Eastern Airlines, Inc.*, 159 F. Supp. 750.

The situation presented herein is with respect to the navigable airspace analogous to the situation presented with respect to the regulation and control of the many navigable streams throughout the United States. Both have evolved to the point where Federal Control over their use is now complete, precluding the assertion of any private right in these areas. In other words where the United States has asserted its superior right in the airspace of this country, does a state or any citizen of that state have a right in such airspace which could be asserted against the superior right of the United States. The reasoning of this Honorable Court as applied to this related area of navigable streams is best exemplified by the opinion of this

Honorable Court in the case of *United States vs. Grand River Dam Authority*, 363 U.S. 229, 4 L. Ed. 2d 1186, 80 S. Ct. 1134, wherein at pages 231 and 232 of the majority opinion, this Honorable Court pointed out that:

> "The Court of Claims recognized that if the Grand River were a navigable stream the United States would not be liable for depriving another entrepreneur of the opportunity to utilize the flow of the water to produce power. *Our cases hold that such an interest is not compensable because the United States asserts its superior authority under the Commerce Clause to utilize or regulate the flow of the water of a navigable stream. There is no 'taking' of 'property' in the sense of the Fifth Amendment because the United States has a superior navigation easement which precludes private ownership of the water or its flow.*" (See also *Braniff Airways vs. Nebraska State Board*, 347 U.S. 590, 89 L. Ed. 967, 74 S. Ct. 757 at page 596.) (Emphasis added)

The early reasoning of this Honorable Court in the case of *Northwest Airlines vs. Minnesota*, 322 U.S. 292, 88 L. Ed. 1283, is directly in point in that it demonstrates an early recognition by this Honorable Court of the growth of air commerce and of the superior right possessed by Congress in regulating the navigable airspace of the United States. This reasoning can be found stated at pages 303 and 304 of Mr. Justice Jackson's concurring opinion in that case wherein it was pointed out that:

> "We are at a state in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons v. Ogden*, 9 Wheat (U.S.) 1, 6 L. Ed. 23, came before this court. *Any authorization of local burdens on our national air commerce will lead to their multiplication in this country.* * * *
>
> "Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses hori-

zontal control of all the sea before him. *The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.*

"Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons vs. Ogden,* 9 Wheat (U.S.) 1, 6 L. Ed. 23 *United States vs. Appalachian Elec. Power Co.,* 311 U.S. 377, 85 L. Ed. 243, 61 S. Ct. 291. *Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.*

"Congress has recognized the national responsibility of regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the federal government alone, not to any state government."

The decision by the Ohio Supreme Court in the instant case is totally inconsistent with the elaborate and established scheme of Congress established with the adoption of the Federal Aviation Act of 1958, a complete and exclusive scheme of control and regulation of the navigable airspace of this country. The action on the part of the Ohio Supreme Court in this case seeks to disregard the superior federal right in the navigable airspace by creating

a private property right in the adjacent property owners in the navigable airspace. The Supreme Court of Ohio, as demonstrated by its decision, Appendix A, page 28 has not limited its decision to requiring petitioner to appropriate avigation easements through the non-navigable airspace. The end result of this decision is a total denial by a state court of the supremacy of the United States in the navigable airspace of this country. By virtue of this decision, petitioner is now placed in the position of having to attempt to utilize its power of eminent domain to acquire avigation easements through an area which has already been preempted by the United States, an area in which petitioner is precluded from using its power of eminent domain. Such a result has been reached by no other state, and no similar requirement is imposed on the users of comparable area, namely navigable streams. Further, if we accept the proposition that Congress by enacting the Federal Aviation Act of 1958 has redefined the term "navigable airspace", thereby placing in the public domain that amount of airspace needed to insure safety in landing and taking off from any given airport, then, the question immediately arises regarding whether or not there has in fact been a "taking" of any property rights by petitioner. In other words, the question of "who" if anyone has taken any property interest which must be paid for is more sharply drawn and clearly defined herein than it was in *Griggs vs. Allegheny County*, 369 U.S. 89, 7 L. Ed. 2d 585, 82 S. Ct. 581. A recognition of this problem can be found clearly stated in the dissenting opinion written in the *Griggs* case, *supra*, wherein it was pointed out at page 92 and 93 of the opinion that:

> "Congress has over the years adopted a comprehensive plan for national and international air commerce, regulating in minute detail virtually every aspect of air

transit from construction and planning of ground facilities to safety and methods of flight operation. *As a part of this overall scheme of development, Congress in 1938 declared that the United States has 'complete and exclusive national sovereignty in the airspace above the United States' and that every citizen has a public right of freedom of transit in air commerce through the navigable airspace of the United States.* Although in Causby the Court held that under the then existing laws and regulations that the airspace used in landing and take-off was not part of the 'navigable airspace' as to which all have a right of free transit, *Congress has since, in 1958, enacted a new law, as part of a regulatory scheme even more comprehensive than those before it, making it clear that the 'airspace needed to insure safety in take-off and landing of aircraft' is 'navigable airspace'.* Thus Congress has not only appropriated the airspace necessary for planes to fly at high altitudes throughout the country but has also provided the low altitude airspace essential for those same planes to approach and take off from airports. These airspaces are so much under the control of the Federal Government that every takeoff from and every landing at airports such as the Greater Pittsburgh Airport is made under the direct signal and supervisory control of some federal agent." (Emphasis added)

If we accept, and it appears self-evident that we must, that federal control of the navigable airspace of this country is now complete and exclusive, the clear inconsistency of the Ohio Supreme Court's decision with this scheme of federal control is readily apparent, and the reasons for granting this writ of certiorari are likewise readily apparent. First, the decision of the Ohio Supreme Court is completely inconsistent with any scheme of federal control of the navigable airspace and serves to completely thwart the exercise by Congress of the power given to it by the Commerce Clause to regulate the navigable airspace, set-

ting up in effect, barriers to the already evolving system of national air commerce and the regulation thereof by the federal government. In fact this decision represents a step backward toward the doctrine of "*Cujus est solum ejus est usque ad coelum,*" which was presumably laid to rest by this Honorable Court in the Causby case. Second, the decision by the Ohio Supreme Court effects a complete denial of the federally created right of free transit in the navigable airspace of the United States, a right which is possessed by every citizen of the United States, resulting in the rather incongruous situation, that those same citizens who have been given a right of free transit through the navigable airspace of this country will be forced to pay a charge to utilize that right by virtue of the fact that petitioner because of this action by a state court will have to increase the landing fees being charged at Columbus Mucipal Airport in order to derive the funds necessary to pay the cost of compensating property owners for avigation easements acquired through the navigable airspace. The definite import of this decision is to impose a burden on those interstate and foreign air carriers, and military air carriers who daily travel into and out of Columbus Muncipal Airport contrary to the express intention of Congress set forth in the Federal Aviation Act of 1958, giving to such air carriers a free right of transit through the navigable airspace of this country.

It is likewise apparent that this decision by the Ohio Supreme Court is in clear conflict with the decision of this Honorable Court in *United States vs. Causby, supra,* in that this decision dispenses altogether with the requirement that flights be over respondents' property, dispenses with the requirement that respondents' property either be rendered uninhabitable or no longer fit for the use to

which it was being put and the decision by the Ohio Supreme Court fails to give any credence to the proposition as announced in the *Causby* case, *supra, that where Congress does exercise the authority vested in it by the commerce clause and includes that amount of airspace needed to insure safety in landing and taking off from an airport in the navigable airspace, then such flights in that area are immune.*

The questions propounded herein are decidedly of great significance if we assume for the moment that our basic aim and the basic aim of Congress in enacting the Federal Aviation Act of 1958 was to foster the growth of air commerce along the lines of a well regulated uniform federal scheme, then ample reason exists for granting that this writ of certiorari in order that the questions posed herein, which were urged on the lower courts can be answered once and for all. The problem now becomes is air commerce to progress forward as the rail industry did, or are the states to be permitted to totally thwart and frustrate this national industry, until the ultimate consequence that different requirements and regulations governing the operation of air carriers and airports may evolve in each state. The decision by the Ohio Supreme Court in this case serves not only to confuse and perplex an already confused problem, as is witnesses by the confusion surrounding the decisions in *Martin vs. Port of Seattle,* 64 Wash. 2d 324, 391 P. 2d. 540, and *Batten vs. United States,* 306 F. 2d 580, Cert. Den. 371 U.S. 955, 9 L. Ed. 2d 502, but serves to further erect a barrier to free air commerce, when no similar result can be found anywhere or in any related field. The problems raised by petitioner herein are of great general and public concern to every municipality owning and operating an airport in this country, the interstate

and foreign air carriers serving the public, and petitioner. This Honorable Court should grant petitioner's request for a writ of certiorari and the questions raised herein should be answered in order that the morass of confusion which has grown up and presently surrounds the field of air commerce may, once and for all be laid to rest. Permitting this obvious local burden to exist on our well established national air commerce can only lead to a multiplication of such burden throughout this country.

Respectfully submitted,

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APPENDIX A

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 212,293

STATE OF OHIO, EX REL., VIRGINIA ROYAL, ET AL.,
Relators,

vs.

CITY OF COLUMBUS, ET AL.,
Respondents.

DECISION

Rendered this 5th day of July, 1963.

REYNOLDS, J.

In this case relators are seeking a writ of mandamus to compel defendants to institute proceedings for the appropriation of relators' property rights which are claimed to have been used by aircraft making low flights over relators' homes while in the process of landing on or taking off from defendants' airport.

The basis of relators' action is that the aircraft are so operated as to interfere with the enjoyment of the relators' property and by so doing the respondents have, in effect, appropriated some of relators' property and without payment therefor and that by reason thereof relators' property rights have been taken without just compensation therefor.

A trial was had and numerous witnesses testified that the noise of the aircraft flying over this area immediately

adjoining the defendants' airport on the east, disturbs the peace and quiet, their sleep, the vibrations from the aircraft in some cases loosening plaster on the walls of the homes, rendering television unusable at times and even jarring dishes and other household articles from the shelves.

From the evidence adduced there can be no doubt but that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use.

The prayer of the amended petition is granted and the respondents ordered to take the proper steps to see that adequate compensation is afforded.

DANA F. REYNOLDS,
Judge.

Appearances:

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IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, EX REL. VIRGINIA ROYAL, ET AL.,
Relators-Appellees,

vs.

CITY OF COLUMBUS, ET AL.,
Respondents-Appellants.

OPINION
(Rendered on June 9, 1964)

BRYANT, J.

This is an appeal on questions of law. It was begun by Virginia and John C. Royal, relators, of a petition for a writ of mandamus naming as respondents the city of Columbus, the mayor, city council and city clerk of Columbus. The petition was filed on October 10, 1961, in the Court of Common Pleas of Franklin County, Ohio. It alleged the corporate and official capacities of the city and the city officials named as respondents.

It was further alleged that relators were the owners of two lots located in the Wonderland Addition of Columbus, and a frame house located thereon where relators made their home. The Wonderland Addition is located close to the Columbus Municipal Airport, and the complaints of relators deal primarily with airplane traffic using what is described in the petition as a 6000 foot instrument runway designated as 27R-9L, hereinafter referred to as the 1961 runway.

The petition further alleges that relators' property lies within "the instrument approach zone" to the 1961 runway; that aircraft using the 1961 runway "make frequent and low level flights over relators' property interfering

with and destroying the usefulness and value" thereof, and as a result the city of Columbus "appropriated to a public use an easement in their property for air flight and other public purposes."

The petition further alleges that the city has failed and refused to pay relators just compensation and concludes with a prayer for a writ of mandamus requiring the city to initiate proceedings to condemn relators' property and determine the compensation due to the relators.

An answer was filed admitting the corporate and official capacities of the city and officials named as respondents, admitting that relators own the real estate claimed by them, and generally denying all the other allegations of the petition. Thereafter, a motion was made and sustained to permit other owners of property in the Wonderland Addition to join as plaintiffs and, as a result, an amended petition was filed containing the names of forty-six persons as relators, while in the body of the petition there is a description of the property owned by each of them along with the other allegations of the petition. Altogether these forty-six relators claim ownership in a total of 103 lots in the Wonderland Addition.

The matter came on for trial before a judge of the court below without a jury. Eighteen witnesses testified and fourteen exhibits were presented. These included a plat of the Wonderland Addition and a plan of the airport. Another exhibit was a three-page document apparently showing as to each of the relators' property, the location, distance from end of 1961 runway, distance right or left from the centerline of the 1961 runway, and the "glide angle height above house" as to each of said properties. This latter figure ranged from a minimum of fifty feet to sixty feet to a maximum of ninety feet.

Included in exhibits were also photographs showing a cracked windowpane, damage to fireplace, window frame, etc., and other documents and papers.

At the conclusion of the hearing, the trial court handed down a decision in favor of the relators and against the city of Columbus. It was the opinion of the court below that on the basis of the evidence presented "there can be no doubt but that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use." Respondents-appellants have appealed to this court.

Three errors are assigned by respondents-appellants herein reading as follows:

> "1. The Trial Court erred in admitting certain evidence over the objection of Respondents.
> "2. The Trial Court erred in overruling Respondents Motion for Dismissal made at the close of Relators case.
> "3. The Trial Court erred in granting the Writ of Mandamus, when the evidence demonstrated that Relators had not established a clear right to such writ."

As to the first assignment of error, it appears that it relates only to the testimony of Curtis French offered on behalf of relators. (R. 35 et seq.) We do not think this assignment of error is well taken. French testified on a variety of subjects and was given an exhaustive cross-examination, recross-examination and re-recross-examination. Any error originally claimed was waived, and there being no jury present, it may be assumed the trial court was able to distinguish proper evidence from that which was not. This error is not well taken.

The second and third assignment of errors would appear to raise the question that the decision and judgment were contrary to the weight of the evidence. However, counsel for respondents-appellants limit their claim to the question as to whether relators-appellees had maintained the burden of proof which rested on them in this case.

It is, of course, clear that the evidence was very much in dispute. However, in our opinion, there was some credible evidence on every material issue in the case which, if believed by the trial court, would support and sustain the decision and judgment. The trial court chose to believe the witnesses offered on behalf of relators-appellees. Their testimony was supported to a greater or lesser degree by witnesses offered by respondents-appellants. We are of the opinion that the second and third assignments of errors are not well taken and must be overruled.

Finding no prejudicial error in the record, each of the errors assigned must be overruled, the judgment of the court below affirmed and the cause remanded.

Judgment affirmed.

DUFFY, P.J., and TROOP, J., concur.

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, EX REL. VIRGINIA ROYAL, ET AL.,
Relators-Appellees,

vs.

CITY OF COLUMBUS, ET AL.,
Respondents-Appellants.

OPINION

(Rendered on July 14, 1964)

Per Curiam.

The sole question before the court at this time arises upon a motion filed on behalf of respondents-appellants asking this court to reconsider a decision heretofore announced affirming the judgment of the court below.

Upon consideration of the motion to reconsider, we are of the opinion it is not well taken, must be overruled, and it is so ordered.

DUFFY, P.J., BRYANT and TROOP, JJ., concur.

State, ex rel Royal v. City of Columbus, 3 Ohio St. 154

Appropriation of property for public use—What constitutes "taking"—Low and frequent airflights interfering with enjoyment of land.

There exists a "taking" in a constitutional sense of private property for public use under Section 19, Article I of the Ohio Constitution whenever airflights are so low and so frequent as to be a direct and immediate interference with enjoyment and use of the land.

(No. 39069—Decided July 21, 1965.)

APPEAL from the Court of Appeals for Franklin County.

This is an action in mandamus which originated in the Court of Common Pleas of Franklin County on October 10, 1961.

Virginia Royal and John C. Royal, relators, appellees herein, sought a writ of mandamus to compel the respondents, the city of Columbus, the mayor and members of city council, appellants herein, to institute appropriation proceedings for the purpose of compensating appellees for certain property rights allegedly taken by appellants.

Appellees allege that frequent and low-level airplane flights over their property, originating at *appellants' airport*, have interfered with and destroyed the usefulness and value of their property as a residence and that appellants have appropriated to public use an easement in their property for air flight.

Prior to trial, by agreement of the original parties and with the consent of the trial court, 39 additional party relators with interests in real property similarly situated to the two original relators were added.

The trial court, from the evidence adduced, found that there had been a taking of property rights by respondents and issued the writ of mandamus.

Upon appeal to the Court of Appeals for Franklin County, the judgment of the trial court was affirmed.

The cause is now before this court upon the granting of appellants' motion to certify the record.

Mr. Joseph S. Deutschle, Jr., *Mr. James C. Britt* and *Mr. Willis E. Wolfe, Jr.*, for appellees.

Mr. John C. Young, city attorney, *Mr. Alba L. Whiteside* and *Mr. Thomas A. Bustin*, for appellants.

HERBERT, J. Appellants have presented in their brief filed in this court some 15 questions of law, supplemented by some 12 subordinate questions of law for this court's de-

termination. This is in contrast to the following three errors, filed in the Court of Appeals, that appellants claim appear in the record in the Court of Common Pleas of Franklin County.

"1. The trial court erred in admitting certain evidence over the objection of respondents.

"2. The trial court erred in overruling respondents motion for dismissal made at the close of relators' case.

"3. The trial court erred in granting the writ of mandamus, when the evidence demonstrated that relators had not established a clear right to such writ."

Nearly all the questions presented by appellants are, in effect, questions appearing for the first time in this cause in this court. It is well established that this court need not consider or determine claimed errors which were not raised or preserved in the Court of Appeals. See *State, ex rel. Babcock, v. Perkins*, 165 Ohio St. 185; 4 Ohio Jurisprudence 2d 534, Appellate Review, Section 1178.

We note also that many of the belatedly raised questions concern alleged errors occurring in the trial court in which appellants either participated in or acquiesced. The record shows that the appellants consented to a joinder of some thirty additional parties "because of the cost involved if they had to file an individual case * * *." Appellants agreed also with a ruling of the trial court, after some eight relators had testified as to appellants' interference with the enjoyment of their property, that the testimony of the remaining appellees would be cumulative. Appellants did not utilize the opportunity afforded to them by the trial court to cross-examine this cumulative evidence. Now appellants seek to question, for the first time, the quantum of evidence presented to trial court concerning each individual piece of property.

"It is well settled that an appellant * * * cannot attack a judgment for errors committed by himself, or for errors which he induced the court to commit or into which he either intentionally or unintentionally misled the court, and for which he is actively responsible." 3 Ohio Jurisprudence 2d 641 to 646, Appellate Review, Invited Error, Sections 693 to 696. See, also, 4 Ohio Jurisprudence 2d 40, Appellate Review, Section 836, Misjoinder.

We therefore consider only those errors presented to the Court of Appeals.

Considering the first assignment of error, appellants object to the testimony of one Curtis French offered on behalf of appellees. The Court of Appeals, in passing on this error, stated as follows:

> "* * * French testified on a variety of subjects and was given an exhaustive cross-examination, recross-examination and re-recross-examination. Any error originally claimed was waived, and there being no jury present, it may be assumed the trial court was able to distinguish proper evidence from that which was not. This error is not well taken."

We do not find the Court of Appeals ruling on the first assignment of error to be erroneous.

The Court of Appeals, in considering the second and third assignments of error, interpreted them "to raise the question that the decision and judgment were contrary to the weight of the evidence. *However, counsel for respondents-appellants limit their claim to the question as to whether relators-appellees had maintained the burden of proof which rested on them in this case.*"

It is well recognized that a person seeking a writ of mandamus must establish a clear right to the relief sought. 35 Ohio Jurisprudence 2d 461 and 463, Mandamus, Sections

170 and 171. In the instant case, the relief sought was an order directing appellants to institute appropriation proceedings for the purpose of compensating appellees for certain property rights allegedly taken by appellants. Thus, the issue before the trial court in this cause was whether there had been a "taking" of private property contrary to Section 19, Article I of the Ohio Constitution.

Did appellees show a clear right to the relief sought? The United States Supreme Court had considered on two occasions whether there had been a "taking" of property by virtue of airplane flights over private property under the Fifth Amendment (*United States v. Causby*, 328 U.S. 256, 90 L. Ed. 1206) or the Fourteenth Amendment (*Griggs v. Allegheny County*, 369 U.S. 84, 7 L. Ed. 2d 585) of the United States Constitution.

In *Causby, supra*, the Supreme Court enunciated the following test:

> "* * * Flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *United States v. Causby, supra* (328 U.S. 256, 266, 90 L. Ed. 1206, 1216).

Applying the above test the Supreme Court found there had been a "taking" in a constitutional sense of air easement, for which compensation must be made, by low flights of United States airplanes over a chicken farm which rendered the property unusable for that purpose.

In *Griggs, supra*, the Supreme Court considered the plight of homeowners who were subjected to similar low level flights as in *Causby, supra*, but who were not conducting a business on their land. In its opinion the court noted that flight patterns ranged "from 30 feet to 300 feet over petitioner's residence; and on let-down they were within

53 feet to 153 feet," that its occupants were frequently unable to sleep, that the windows of the home would rattle and plaster would sometimes fall when the flights occurred, and that the health of the occupants was affected and impaired. The court states, "the use of the land presupposes the use of some of the airspace above it. * * * Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."

The principles found in *Causby* and *Griggs* are applicable to the instant case. There exists a "taking" in a constitutional sense under Section 19, Article I of the Ohio Constitution, whenever airflights "are so low and so frequent as to be a direct and immediate interference with enjoyment and use of the land." And we think that a person's residence is a use for which he is entitled to compensation whenever he can prove a direct and immediate interference with that use.

The trial court in this cause, in its opinion found that "from the evidence adduced there can be no doubt but [*sic*] that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use." The trial court relied on evidence that the air flights disturbed sleep, loosened plaster on walls, and jarred dishes and other objects from shelves.

The Court of Appeals noted in its opinion that the evidence showed damage to a window, fireplace, and window frame and that "the 'glide angle height above house' as to each of said properties * * * ranged from a minimum of fifty feet to sixty feet to a maximum of ninety feet."

In view of the facts that the appellants agreed to try at one trial the issues of a "taking" as to 28 different parties, and that the appellees' evidence, if presented, would be cumulative, we do not feel constrained to disturb the Court of Appeals' judgment on the second and third assignments of error as to the evidence.

It is not without most serious deliberation that we do not consider certain questions raised by appellants in this court. But a public body, no less than an individual, must adhere to the procedures governing judicial inquiries. And it may not agree, intentionally or unintentionally, that suitors join collectively to present but a part of their evidence and attack the quantum of evidence on appeal. (Nor may it conduct its first real fight of the issues in this court. Compare *Williamson v. Rubich*, 171 Ohio St. 253.)

The ultimate liability of appellants, if any, will be determined in subsequent proceedings.* We think substantial justice has been accorded to all the parties.

For the above mentioned reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

ZIMMERMAN, O'NEILL and BROWN, JJ., concur.

TAFT, C. J., MATTHIAS and SCHNEIDER, JJ., dissent.

SCHNEIDER, J., dissenting. The majority opinion is persuasive of at least one conclusion: that if the court today had launched a vessel of unknown dimensions for an indefinite voyage on an uncharted sea to an undisclosed

* HERBERT, J. It follows therefrom, that the majority opinion neither grants nor denies any compensation to anyone for claims of the "taking" of private property for public use. See Section 19, Article I of the Constitution of the state of Ohio. Thus, it is obvious that the fears expressed in the dissent may be calmed until a Court of Common Pleas and a jury pass upon any question of property rights that may be raised in respect to low-flying airplanes as clearly held by the Supreme Court of the United States.

destination it could not have been the author of more uncertainty.

In effect, the plaintiffs, and countless numbers similarly or even remotely situated, will receive from a subdivision of the sovereign, acting in a sovereign capacity, varying amounts of money damages for injury to their sensibilities.

By bitter contrast, a patient injured bodily in the sovereign subdivision's hospital by the culpability of one of its servants, remains without remedy against the sovereign subdivision. *Hyde v. City of Lakewood*, 2 Ohio St. 2d 155.

APPENDIX B

Constitution of the United States

Fourteenth Amendment, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 8, Clause 3.

"To regulate interstate and foreign commerce among the several States, and with the Indian Tribes."

Federal Aviation Act of 1958

Section 1301 (24): Navigable Airspace.

"'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft."

Section 1304: Public Right of Transit.

"There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

TABLE OF AUTHORITIES

CASES

United States vs. Causby, 328 U.S. 256, 90 L. Ed. 1206 3, 4, 6

Griggs vs. Allegheny County, 369 U.S. 84, 7 L. Ed. 2d 585 ..... 3, 6

OTHER AUTHORITIES

United States Constitution, Fifth Amendment 4

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Constitution of Ohio, Article I, Section 19 4

Federal Aviation Act of 1958 ..... 5, 6

IN THE

Supreme Court of the United States

October Term, 1965

No. 829

THE CITY OF COLUMBUS, OHIO,

Petitioner.

vs.

STATE OF OHIO, EX REL., VIRGINIA ROYAL,

Respondents.

BRIEF

After a careful study of the Petition herein, Respondents have concluded that the essence of the Petitioner's prayer for a Writ of Certiorari is twofold in that (1) Respondents failed at the trial level to maintain the necessary burden of proof, and, (2) that, regardless of the evidence produced Respondents have not stated, and do not have a cause of action against Petitioner, because of the provisions of the Federal Aviation Act of 1958.

The impression that Petitioners are again raising the question of the quantum of evidence comes from Petitioner's "STATEMENT" as it appears on pages 3, 4, 5 and

6 of the Petition. Counsel for Respondents must confess that they have difficulty in recognizing the Petitioner's "STATEMENT" as the same case as the one which was tried before the Court of Common Pleas of Franklin County, Ohio.

Without an extensive detailed review of all the evidence presented at the trial, the history of the case reveals that:

A. The Trial Court Found: (Record, Appendix A, page 17)

> "From the evidence adduced there can be no doubt but that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use."

B. The Court of Appeals Ruled: (Record, Appendix A, page 22)

> "The second and third assignment of errors would appear to raise the question that the decision and judgment were contrary to the weight of the evidence, however, counsel for respondents-appellants limit their claim to the question as to whether relators-appellees had maintained the burden of proof which rested on them in this case.
>
> "It is, of course, clear that the evidence was very much in dispute. However, in our opinion, there was some credible evidence on every material issue in the case which, if believed by the trial court, would support and sustain the decision and judgment. The trial court chose to believe the witnesses offered on behalf of relators-appellees. Their testimony was supported to a greater or lesser degree by witnesses offered by respondents-appellants. We are of the opinion that the

second and third assignments of errors are not well taken and must be overruled."

C. The Supreme Court of Ohio followed the pronouncements of *United States against Causby*, 328 U.S. 256, 90 L. Ed. 1206 and *Griggs v. Allegheny County*, 369 U.S. 84, 7 L. Ed. 2d 585 and stated in its opinion:

"The principles found in *Causby* and *Griggs* are applicable to the instant case. There exists a 'taking' in a constitutional sense under Section 19, Article I of the Ohio Constitution, whenever airflights 'are so low and so frequent as to be a direct and immediate interference with enjoyment and use of the land.' And we think that a person's residence is a use for which he is entitled to compensation whenever he can prove a direct and immediate interference with that use.

"The trial court in this cause in its opinion found that 'from the evidence adduced there can be no doubt but (sic) that relators' property rights have been interfered with, their property has depreciated in value by reason thereof, and that there has been an appropriation by defendants by reason of the use of the air above the relators' homes and they are entitled to be compensated for such use.' The trial court relied on evidence that the air flights disturbed sleep, loosened plaster on walls, and jarred dishes and other objects from shelves.

"The Court of Appeals noted in its opinion that the evidence showed damage to a window, fireplace, and window frame and that 'the 'glide angle height above house' as to each of said properties * * * ranged from a minimum of fifty feet to sixty feet to a maximum of ninety feet.'

"In view of the facts that the appellants agreed to try at one trial the issues of a 'taking' as to 28 different parties, and that the appellees' evidence, if presented, would be cumulative, we do not feel constrained

to disturb the Court of Appeals' judgment on the second and third assignments of error as to the evidence.

• • • • •

"The ultimate liability of appellants, if any, will be determined in subsequent proceedings. We think substantial justice has been accorded to all the parties."

Petitioner's contentions with reference to the provisions of the Federal Aviation Act of 1958 are without merit.

The property rights interfered with in the instant case are protected by the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 19 of the Constitution of Ohio. Congress cannot destroy or diminish these rights simply by legislation. While reference is made to the Civil Aeronautics Act of 1938 in *United States vs Causby*, 328 U.S. 256, 90 L. Ed., the case was decided with reference to the Fifth Amendment to the United States Constitution. In the *Causby* case the United States made the same arguments as *Petitioners* make here. However, the United States also recognized that the Civil Aeronautics Act of 1938 notwithstanding, the constitutional protection of property rights would still demand that just compensation should be paid in certain cases. As stated at page 261:

"But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment."

And, had counsel for Petitioner seen fit to include the sentence following the quotation (to which emphasis was

added by counsel) from the *Causby* opinion, as it appears on page 8 of the Petition, it would read as follows:

> "Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking."

Also, later in the opinion, at page 267 it is stated:

> "We need not decide whether repeated trespasses might give rise to an implied contract *Cf. Portsmouth Co. v. United States, supra.* If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine. See *Hollister v. Benedict Mfg. Co.*, 113 U.S. 59, 67; *Hurley v. Kincaid*, 285 U.S. 95, 104; *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 21. Thus, the jurisdiction of the Court of Claims in this case is clear."

Regardless of any provisions of the Federal Aviation Act of 1958, no person shall be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation.

There can be no question that Congress does have the power to declare property to be within the public domain in the form of navigable air space, however, to the extent that the use of such navigable air space invades and interferes with one's use and enjoyment of private property and correspondingly destroys the value of the property, just compensation must be made.

As pointed out above, the Supreme Court of Ohio simply

held that the facts in this case as found by the trial court, and as interpreted by the Court of Appeals, brought the case clearly within the pronouncements of the *United States vs. Causby, supra,* and *Griggs vs Allegheny County,* 369 U.S. 84, 7 L. Ed. 2d 585, 82 S. Ct. 581. The Supreme Court of Ohio did not, as is so alarmingly proclaimed by the Petitioner:

> "... in effect erect a wall around the State of Ohio, disregard the established principle of a free right of transit through the navigable airspace of the United States, and say to the citizens of the United States, the right to use this airspace must be purchased."

The theme of the Petition herein seems to be that "... the morass of confusion which has grown up and presently surrounds the field of air commerce ..." has been further confused and perplexed by the decision in this case. As Petitioner states on pages 7 and 8 of its Petition:

> "To contemplate such a confused and chaotic situation is to realize the national importance of this case, and the threat it poses to a clearly evolved and definitely established congressional scheme of air regulation, as set forth in the Federal Aviation Act of 1958. Insofar as this petitioner is aware, this Honorable Court has decided no case expressly involving the Federal Aviation Act of 1958 and its expansion of the navigable airspace of the United States."

Respondents respectfully submit that the foregoing quotation evidences that the only chaos and confusion exists on the part of the Petitioner, and that the Federal Aviation Act of 1958 was expressly involved in *Griggs vs Allegheny County, supra,* as is so clearly demonstrated by the following quotation from page 88 of the Opinion:

> "We start with *United States vs. Causby, supra,*

> which held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of air easement for which compensation must be made. At the time of the *Causby* case, Congress had placed the navigable airspace in the public domain, defining it as 'airspace above the minimum safe altitudes of flight prescribed' by the C. A. A. 44 Stat. 574. We held that the path of the glide or flight for landing or taking off was not the downward reach of the 'navigable airspace.' 328 U.S., at 264. Following the decision in the *Causby* case, Congress redefined 'navigable airspace' to mean 'airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.' 72 Stat. 739, 49 U. S. C. § 1301 (24). By the present regulations the 'minimum safe altitudes' within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, '(e)xcept where necessary for take-off or landing.' But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. 328 U.S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'' 328 U.S., at 265.

The law governing the case at bar is clear and well settled. To plagiarize and paraphrase from this Court's opinions; while the owner of property does not in any physical manner occupy that stratum of space above his property or make use of it in the conventional sense, at low altitudes it is so close to the land that continuous invasions of such air space which affect the use of the surface of the land itself and which cause a depreciation of its fair market value are as an incident of ownership, in the

same category as invasions of the surface; and, when flights of aircraft in connection with the public use are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land, the owner's loss, not the taker's gain, requires that just compensation be made.

Accordingly, Petitioner's prayer for Writ of Certiorari should be denied.

Respectfully submitted,

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